IN THE

Supreme Court of the United States

October Term, 1971
No. 71-554

DENNIS L. LIEPMAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	1
Constitutional Provisions Involved	2
Statement of the Case	2
Statement of Facts	2
Argument	6
I	
The Decision Below Was Correct. Petitioner Had No Reasonable Expectation of Privacy	6
II	
This Case Turns on Unusual Facts and Is Not Sufficiently Important to Justify the Granting of Certiorari	10
Conclusion	10

TABLE OF AUTHORITIES CITED

Cases	Page
Atwell v. United States, 414 F. 2d 136	9
Harris v. United States, 390 U.S. 234	9
Katz v. United States, 398 U.S. 347	6
Ponce v. Craven, 409 F.2d 621	9
United States v. Crane, 445 F.2d 509	9
United States v. Hanahan, 442 F.2d 649	9
United States v. Llanes, 398 F.2d 880	9
United States v. Polk, 433 F.2d 644	9
United States v. Vilhoitti, 323 F. Supp. 425	8, 9
Rule	
California Rules of Court, Rule 976	1
Statutes	
California Health and Safety Code, Sec. 11530	2
California Health and Safety Code, Sec. 11910	2
California Health and Safety Code, Sec. 11911	2
California Penal Code, Sec. 1538.5	3
United States Code, Title 28, Sec. 1257(3)	1
United States Constitution, Fourth Amendment	1, 2
United States Constitution, Fifth Amendment	1, 2
United States Constitution, Ninth Amendment	2
United States Constitution, Fourteenth Amendment	1, 2

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Opinion Below

The opinion of the Court of Appeal of the State of California, Second Appellate District, which was unpublished pursuant to Rule 976, California Rules of Court, is reproduced as an exhibit to the petition.

Jurisdiction

Petitioner seeks the jurisdiction of the Court under 28 U.S.C. section 1257(3).

Question Presented

Did petitioner have a reasonable expectation of privacy, which was intruded upon in violation of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution, when petitioner created a hole in the wall of a commercial building in the course of extending the exhaust pipe of a machine through it,

when the hole was considerably larger than the exhaust pipe, such that a police officer, standing on the commercial premises to the rear of the building, could see the interior of the garage and observe a machine used to manufacture amphetamine tablets?

Constitutional Provisions Involved

Petitioner invokes the Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

Statement of the Case

In a court trial in the Los Angeles County Superior Court petitioner was found guilty on three counts, of possession of benzedrine for sale, possession of seconal, and possession of marijuana, in violation of California Health and Safety Code sections 11911, 11910, and 11530. The judgment was affirmed on July 15, 1971, by the California Court of Appeal, Second Appellate District, in an unpublished opinion which is attached as an exhibit to the petition. A petition for hearing in the California Supreme Court was denied on September 8, 1971.

Statement of Facts

Officer McKnight of the Los Angeles Police Department obtained a search warrant for the search of petitioner's residence in Arcadia, California, and for petitioner's business premises in South El Monte. [Rep. Tr. pp. 40-42.] Petitioner accompanied Officer McKnight during the search of the business premises, where a machine used to manufacture amphetamine tablets was found. [Rep. Tr. pp. 44-45, 49-50.] During a search of petitioner's residence pursuant to the warrant, vari-

ous jars of amphetamine, amobarbital, pentobarbital, and secobarbital, as well as marijuana and various items used in the manufacture of dangerous drugs, were found. [Rep. Tr. pp. 58-70, 73-74, 96-99.]

The issue in the present petition involves a prior warrantless search on the business premises, which provided in part the basis for the issuance of the search warrants. Testimony as to the circumstances of this search was given at a hearing in the trial court on a motion to suppress evidence pursuant to California Penal Code section 1538.5. In addition, Officer McKnight's affidavit in support of issuance of the search warrant and several photographs introduced by petitioner were admitted into evidence as exhibits at the hearing, and referred to by the Court of Appeal in its opinion.

In March of 1969 Officer McKnight received a telephone call from an unidentified informant who stated that petitioner had at his business a machine to manufacture amphetamine tablets, and that petitioner was going to set up the manufacture of "bennies." Officer McKnight verified that petitioner was the owner of the business premises mentioned by the informant, the Proclean Chemical Company in South El Monte. On July 28, 1969, the same informant again called Officer McKnight and stated that petitioner was then operating the pill machine and manufacturing "bennies." Officer McKnight verified with the owner of the business premises directly next door to petitioner's that an extremely loud machine had been operating at petitioner's business. (Affidavit in Support of Search Warrant.)

Petitioner owned and operated a janitorial cleaning service at this address. The property consisted of a single-family residence and a detached garage, both of which had been converted to business use. The former residence was used as the business office, and the detached garage and another similar structure to the rear of the location were used as storage facilities. [Rep. Tr. pp. 42-43.] Petitioner employed eight workers in the business, and supervised it himself on both days and evenings. [Rep. Tr. p 106.]

On July 29, 1969, around 9:00 p.m., Officer McKnight and his partner, Officer Robison, went to these premises. A chain link fence surrounded the property, and in the front was a second fence. The police entered the premises through the two fence gates, neither of which was locked at this time. [Rep. Tr. pp. 6-8.] A person entering the premises for commercial purposes would use these same two gates. [Rep. Tr. pp. 15-16.] Officer McKnight saw several individuals at the location. He spoke to them briefly, and they stated that they worked at the company and that they were going out to clean. [Rep. Tr. p. 16.]

Officer McKnight went to the rear of the garage and observed an exhaust pipe protruding from the rear of the building. [Rep. Tr. p. 9.] There were many items and cans stored in the area, but there was a clear and unobstructed view of the exhaust pipe. [Rep. Tr. pp. 10-11, 31.] Without moving any of these objects, the officers were able to go up to the wall where the exhaust pipe was protruding. [Rep. Tr. pp. 14, 31.]

There were no windows in this garage through which the interior could be seen, and the garage door was padlocked. [Rep. Tr. pp. 11-12.] Officer McKnight approached the exhaust pipe and observed two openings in the wall of the building, the hole through which the pipe protruded, and another torn or broken area which had been damaged. [Rep. Tr. pp. 12-14.] The pipe was about three feet from the ground and it protruded two or three inches. [Rep. Tr. p. 14.] The hole around the exhaust pipe was larger in size than the pipe itself. Upon examining the exhibits the Court of Appeal described the other hole in the following manner:

> ". . . At one side of the [exhaust pipe] hole there was a breach in the horizontal siding about the width of the diameter of the hole at the point where the exhaust pipe was, tapering to a somewhat smaller width as the breach extended away therefrom. From the photograph the breach appears to be about 18 inches in length. Therefore, the gap in the wall was fairly substantial. . . ." (Opinion, pp. 6-7 of Exhibit to the petition.)

With his face near the pipe and his partner illuminating the area with a flashlight, Officer McKnight could see the interior of the garage. [Rep. Tr. p. 14.] He could observe in the garage a machine which, in his opinion as an experienced narcotics officer, was used for making pills. [Rep. Tr. p. 17.] The police then left for the purpose of securing the search warrant.

ARGUMENT

I

The Decision Below Was Correct. Petitioner Had No Reasonable Expectation of Privacy

Petitioner contends that the police made an unreasonable intrusion upon his expectation of privacy by looking through the hole in the wall of the garage and observing the pill-making machine. (Petn. pp. 11-24.)

Respondent submits that under the circumstances of this case petitioner had no reasonable expectation of privacy, and thus the observations of the police violated none of petitioner's constitutional rights. The decision below was correct and was supported by relevant case law, and this constitutes a substantial reason for denial of certiorari.

This case should be governed by the principle stated by this Court in *Katz v. United States,* 389 U.S. 347, 351, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967):

> ". . . What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . ."

The petitioner must show both that he exhibited an actual expectation of privacy and that his expectation was one which society is prepared to recognize as reasonable. *Id.* at 361 (concurring opinion).

Here petitioner had no reasonable expectation of privacy. The pill machine was located in a detached garage used as a storage area for petitioner's business. According to petitioner the hole in the wall was made by him over a year before the search. [Rep. Tr. p. 20.] Petitioner gave conflicting testimony as to the ex-

tent or nature of the hole, but was obviously disbelieved by the trial court. As summarized by the Court of Appeal the evidence favorable to the prosecution showed that the circumference of the exhaust pipe hole was larger than the pipe, and that the other breach in the wall was "fairly substantial" and gave "every appearance of having been caused by a crude and careless effort to form the hole." As the Court of Appeal further noted, the long-standing duration of the hole was fairly evidenced, and this fact reflected adversely on petitioner as to his exhibition of an expectation of privacy. (Opinion, pp. 6-7, 12 of Exhibit to the petition.)

The premises appeared to be open for business at the time. The business was a janitorial service which by its very nature would have reason to operate at night. The officers approached the premises through two unlocked gates, the same way any person entering for commercial purposes would. [Rep. Tr. pp. 15-16.] The officers spoke to several employees who said they were about to go out on jobs. [Rep. Tr. p. 16.]

There were various appliances and cans on the platform to the rear of the garage. [Rep. Tr. pp. 10-11, 31.] It is quite likely that employees and suppliers, and possibly customers of the business, would be in this area. The hole in the wall was easily visible and could be reached without moving any of the stored items. [Rep. Tr. pp. 10-11, 14, 31.] Officer McKnight could see through the hole and observe the pill-making machine inside. [Rep. Tr. pp. 14, 17.]

It is evident therefore that petitioner showed neither an actual expectation nor a reasonable expectation of

privacy on the premises. Any number of persons, both employees and members of the public, could have access to the storage area and could see through the hole into the garage. Petitioner carelessly formed the hole and made no effort to patch it. In addition, apparently the pill-making machine was quite noisy and attracted the attention of neighbors (Affidavit in Support of Search Warrant).

Thus, under all the circumstances of the case, petitioner could not reasonably expect that his pill machine would be free from observation by interested persons. It will not suffice merely to argue that commercial premises are entitled to Fourth Amendment protection as well as homes. For the nature of the premises will be a substantial factor in determining the actuality and the reasonableness of the expectation of privacy there entertained. *United States v. Vilhotti*, 323 F. Supp. 425, 431-32 (S.D.N.Y. 1971). It should be noted too that, unlike the cases relied upon by petitioner concerning searches of commercial premises (Petn. p. 17), the instant case does not involve a search of an office or of drawers and documents, but merely the observation of a machine through a hole in the wall of a detached storage building.

The search here is supported by relevant federal authority. *United States v. Vilhotti, supra,* is closely in point. There an FBI agent standing in a service alley of an adjacent apartment building peered through a small space between the boards covering the window of a garage and observed stolen goods. The court held that since the gaps in the boards were readily apparent to any passerby the defendant had no reasonable expectation of privacy.

Similarly in *United States v. Hanahan*, 442 F.2d 649, 653 (7th Cir. 1971), the defendant had no reasonable expectation of privacy in a garage which, although locked, had windows through which passers-by could see inside and which the defendant made no effort to cover.

See also United States v. Crane, 445 F.2d 509, 511, 519 (5th Cir. 1971); *Ponce v. Craven*, 409 F.2d 621, 625 (9th Cir. 1969), *cert. denied*, 397 U.S. 1012, 90 S. Ct. 1241, 25 L. Ed. 2d 424 (1970); *United States v. Llanes*, 398 F.2d 880, 883-84 (2d Cir. 1968), *cert. denied*, 393 U.S. 1032, 89 S. Ct. 647, 21 L. Ed. 2d 576 (1969).

Here the police lawfully entered the premises at a time the business was operating, through the gates a customer would use. They went to an area where employees and deliverymen might be expected. Either the police were in a place where they had a right to be, or at most they committed a minor trespass, which is not determinative of the reasonableness of the search, in light of petitioner's lack of expectation of privacy. *Harris v. United States*, 390 U.S. 234, 236, 88 S. Ct. 992, 19 L. Ed. 2d 1067 (1968); *United States v. Hanahan, supra*, 442 F.2d 649, 654 (7th Cir. 1971); *Atwell v. United States*, 414 F.2d 136, 138 (5th Cir. 1969); *United States v. Polk*, 433 F.2d 644, 647-48 and n.1 (5th Cir. 1970).

That Officer McKnight aided his view with a flashlight is without constitutional significance. *United States v. Hanahan, supra; United States v. Vilhotti, supra*, 323 F. Supp. 425, 431-32 (S.D.N.Y. 1971).

II

This Case Turns on Unusual Facts and Is Not Sufficiently Important to Justify the Granting of Certiorari

The instant case involves an unusual fact situation and does not present a question of sufficient constitutional significance to justify the granting of a writ of certiorari by this Court. It is unlikely that many similar fact situations will arise such that this case could be useful as a guide in the future. Here an unusual type of hole in the wall is involved, not a typical window. The case concerns commercial premises where a machine for manufacturing amphetamine tablets was operating, not a private residence or office. The factual context being unusual, there is no irreconciliable conflict among the Circuits. Nor is the case squarely in conflict with any decision of this Court. This is a state court decision of a federal question which is not of sufficient general interest or importance to be reviewed by this Court.

Conclusion

Because the decision below was correct and because the case turns on unusual facts not presenting important constitutional questions, respondent respectfully requests that the petition be denied.

Respectfully submitted,

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